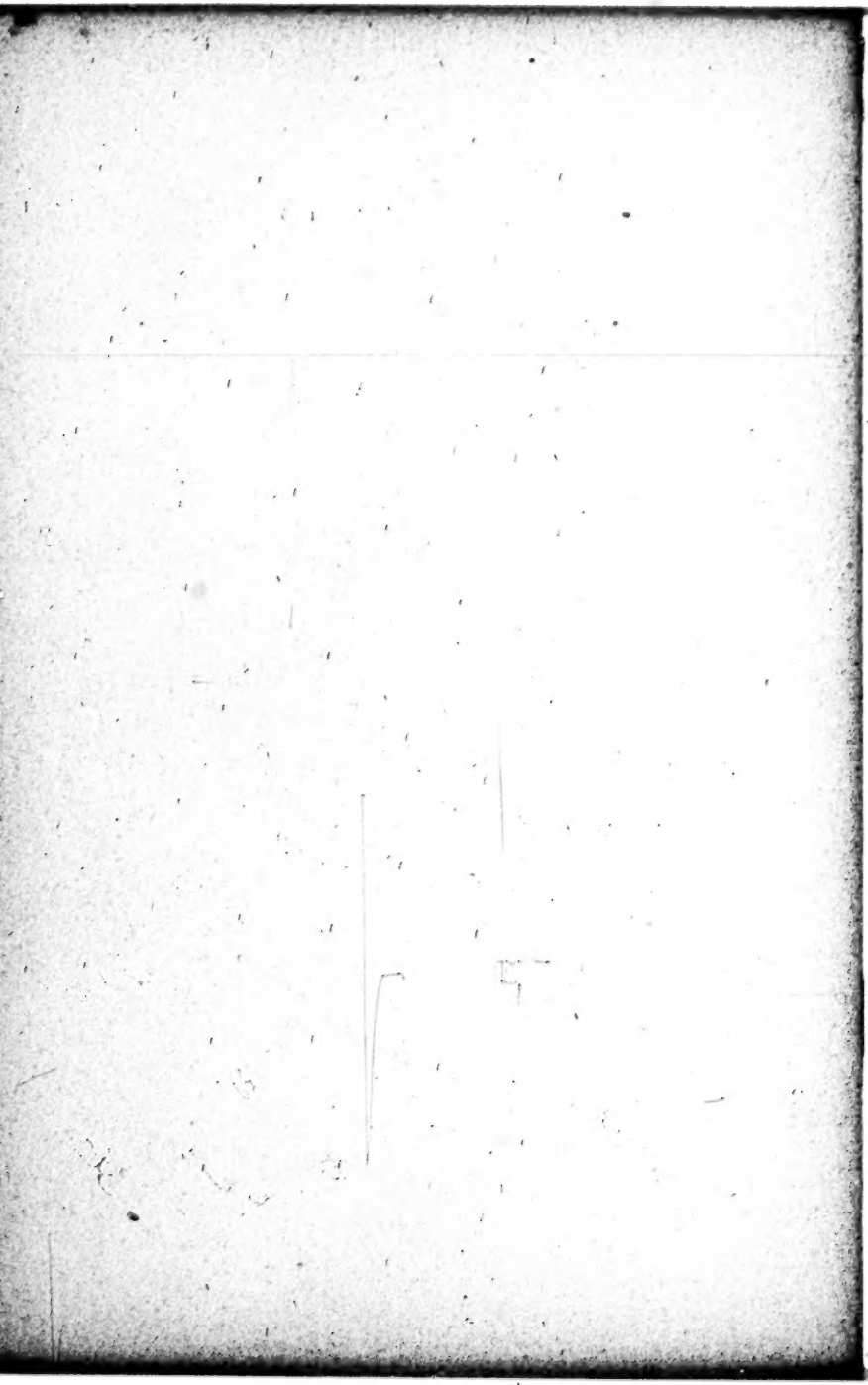

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1162

UNITED STATES OF AMERICA,
Petitioner,

v.

THOMAS JOSEPH WILSON
and
BOBBY ANTONIO BRYAN,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT THOMAS JOSEPH WILSON

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QUESTION PRESENTED

Whether a respectful in-court refusal to testify premised on Fifth Amendment grounds can, consistent with *Harris v. United States*, 382 U.S. 162 (1965), be punished without the procedural protection afforded by Rule 42(b), Fed.R.Crim.Proc.

STATEMENT

Respondent Thomas Joseph Wilson was summarily convicted of criminal contempt [18 U.S.C. §401(3)] for refusing to testify at the bank robbery trial of Robert Joel Anderson. Respondent, who had been indicted with Anderson for the robbery of the Empire National Bank in Tuxedo, New York,[1] had, nine days prior to Anderson's trial, pleaded guilty, but had not yet been sentenced when called to testify. Judge Lasker, who was presiding at Anderson's trial, was the judge before whom respondent would be sentenced.

Unable to post bail pending sentence, respondent was brought to the courtroom from Federal Detention Headquarters without subpoena,[2] placed on the witness stand, and asked to testify (App. 4). He refused to answer the prosecutor's questions on the ground that his answers might tend to incriminate him and result in a more severe penalty on the bank robbery charge (App. 3).

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[1] Anderson was also charged in this indictment with robbery of the Nanuet National Bank in Mount Ivy, New York. In a separate indictment assigned to the Hon. Irving Ben Cooper, respondent Bobby Antonio Bryan was charged with helping Anderson commit that crime. Bryan was also called by the Government as a witness in Anderson's trial. Despite the sequence of the transcripts in the appendix, which indicates that respondent was called before Bryan, the trial record establishes that the reverse is true and that Bryan's refusal to testify and his conviction for contempt occurred first.

[2] Defense counsel objected in vain to this circumvention of Rule 17, Fed.R.Crim.Proc. (App. 4).

Acknowledging that the pendency of Wilson's sentence for the bank robbery was a "relevant legal consideration" to his obligation to testify, Judge Lasker attempted to sentence respondent immediately (App. 4). However, after hearing a description of respondent's psychiatric problems[3] and general background from defense counsel and the probation department, Judge Lasker concluded, "I do not believe that in this complicated case I have sufficient information before me to permit me justly to proceed to sentence with Mr. Wilson" (App. 6-14).

Unable to obviate respondent's claim of possible prejudice to him on his sentence for the bank robbery, Judge Lasker concluded that respondent could not be forced to testify (App. 14).[4] The court also rejected the Government's suggestion that respondent be given a provisional maximum sentence, subject to the result of a ninety-day study and observation, explaining that he

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[3] A psychiatric examination ordered by the district court for the purpose of the bank robbery sentence asserted that, because of a schism with his family, respondent viewed himself as an "unworthy and hopeless individual." Respondent had also received a medical discharge from the Navy due to emotional maladjustment. Judge Lasker, in weighing sentencing alternatives as to the bank robbery, acknowledged respondent's need for psychiatric treatment (App. 11-13).

[4] Although the judge did not here explain his reasons for this decision, he had earlier, at Bryan's contempt proceeding, articulated that there was "no way" to insulate from a sentencing judge's knowledge either the substantive testimony given or the refusal to testify itself (App. 24).

would not impose an arbitrary sentence merely to accommodate the Government.[5]

Nonetheless, after hearing further argument by the Government, Judge Lasker reversed himself and concluded that although respondent had not been sentenced, the Government's offer of immunity was sufficient (App. 15-17). Accordingly, he granted immunity and ordered respondent to testify (App. 17-18). Despite her request, at no time was counsel afforded an opportunity to research the immunity issues raised (App. 5-6).[6] When respondent adhered to his Fifth Amendment privilege, Judge Lasker immediately convicted him of criminal contempt and sentenced him to six months' imprisonment, to run consecutively to the sentence yet to be imposed for the bank robbery[7] (App. 19, 20). The sentence was provisional and subject to the court's receipt of additional information about respondent (App. 18). Execution of the sentence was stayed pending appeal (App. 19).

The court of appeals unanimously reversed, holding that the district court erred in proceeding under Rule

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[5] The court also expressed the view that, while not cumulative, respondent's testimony was not essential, as two other witnesses could identify Anderson (App. 15). As it turned out, even without respondent's testimony Anderson was convicted in a second trial of the Empire Bank robbery.

[6] Not only did defense counsel request a brief continuance to enable adequate preparation of a defense, she also specifically objected to this "hasty" determination of the contempt issue (App. 5).

[7] Respondent was eventually sentenced for the bank robbery to an indefinite term of imprisonment as a youthful offender, pursuant to 18 U.S.C. § 5010(b). He is presently serving that sentence.

42(a) rather than 42(b). Relying on *Harris v. United States*, 382 U.S. 162 (1965), the court ruled, as it had on a prior occasion, that the extraordinary remedy of summary contempt was "inappropriate in the case of an orderly refusal to testify on Fifth Amendment grounds despite a grant of immunity" (Pet. App. 22).

SUMMARY OF ARGUMENT

The court of appeals, relying on *Harris v. United States*, 382 U.S. 162 (1965), correctly held that an orderly and respectful in-court refusal to testify could be punished only after the hearing afforded by Rule 42(b), Fed.R.Crim. Proc. The Government proffers the theory that because the conduct occurred in the presence of the judge, a hearing was unnecessary, and that immediate, summary punishment pursuant to Rule 42(a) was appropriate.

The Government's argument ignores the express language of *Harris*, which limits the use of summary punishment to "exceptional circumstances" constituting "misbehavior." Only the exigencies of a situation engendered by misbehavior occurring in open court and resulting in destruction of the dignity and civility of the court and its process justify circumvention of the procedural safeguard of Rule 42(b). Disobedience, the conduct in question here, is not of the type punishable by summary proceeding, for it can be satisfactorily treated after application of procedural protections.

The distinction between misbehavior and disobedience is historically based, and has been used to prevent abuse of the contempt power. Further,

the function of the hearing under 42(b) is not simply, as the Government would have it, to allow resolution of factual issues, but also to enable counsel for the contemnor to present legal defenses to the contempt and factors in mitigation of the sentence.

The Government suggests that these safeguards should nonetheless be abandoned because summary contempt is necessary to procure testimony of recalcitrant witnesses. This theory is not only inapplicable to the facts of this case—conviction here imposed purely as punishment for refusal to testify—but also is alien to contempt law which provides that civil, rather than criminal, contempt is the remedy. The proper procedure is the immediate imposition of the civil sanction followed, should that fail, by imposition of the criminal penalty after notice and a hearing. In those rare instances where the testimony is essential and previous incarceration renders the civil sanction ineffective, thereby compelling government reliance on the incidental coercive effect of the criminal penalty, a brief adjournment of the on-going proceedings to enable a Rule 42(b) hearing before conviction is the proper procedure.

ARGUMENT

A RESPECTFUL IN-COURT REFUSAL TO TESTIFY PREMISED ON FIFTH AMENDMENT GROUNDS CANNOT, CONSISTENT WITH *HARRIS v. UNITED STATES*, 382 U.S. 162 (1965), BE PUNISHED WITHOUT THE PROCEDURAL PROTECTIONS PRESCRIBED BY RULE 42(b), FED.R.CRIM. PROC.

I

The court of appeals held that an orderly refusal to testify is not an exceptional circumstance justifying the summary procedure of Rule 42(a) of the Federal Rules of Criminal Procedure. The court's ruling was based on its reading of *Harris v. United States*, 382 U.S. 162 (1965), which the Government argues was erroneous because *Harris* must be read to hold that the applicability of Rule 42(a) is governed solely by the place of the alleged contempt, not its nature. Although the conduct in *Harris* occurred before the grand jury, the Court's language and extensive analysis of Rule 42 renders untenable the Government's simplistic *situs* formula.

Harris was decided in the context of the "concern long demonstrated by both Congress and this Court over the possible abuse of the contempt power[8]

[8]In 1831, the abuses of a federal district court judge named James Peck led to the termination of the broad authority granted by Section 17 of the Judiciary Act of 1789 to " . . . punish by fine or imprisonment, at the discretion of said court, all

and . . . the wording of the Rule." 382 U.S. at 164. Thus, it is stated that because it "prescribes the procedural regularity of all contempts in the federal regime" (*Id.* at 167), Rule 42(b) "is the normal procedure." *Id.* at 164. On the other hand, Rule 42(a) was specifically "reserved 'for exceptional circumstances' such as acts threatening the judge or disrupting a hearing or obstructing court proceedings." 382 U.S. at 164, citing *Brown v. United States*, 359 U.S. 41, 54 (1959) (dissenting opinion). Consequently, "[s]ummary contempt is for 'misbehavior' in the 'actual presence of

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contempt of authority in any case or hearing before the same . . . " 1 Stat. 83. To replace Section 17, Congress passed the Act of 1831, which drastically limited the power to punish for criminal contempt. In only three instances was it possible: misbehavior in the presence of the court; misbehavior of court officials in their official transactions; and disobedience of or resistance to the lawful writ, process, order, or decree of the court. 4 Stat. 487.

This concern for abuse of the power also found expression in judicial decisions which drastically curtailed the substantive scope of the power. *Anderson v. Dunn*, 6 Wheat. 204, 231, (1821) ("least possible power to [achieve] the end proposed"); *In re Michael*, 326 U.S. 224, 227 (1945). The type of punishment that can be imposed was limited [*In re Bradley*, 318 U.S. 50 (1943); *Ex Parte Robinson*, 19 Wall. 505, 512 (1873)], as were the offenses to which the statute applied [*Nye v. United States*, 313 U.S. 33, 48 (1941); *In re Michael, supra*, 326 U.S. 224] and the category of persons to whom it extended [*Cammer v. United States*, 350 U.S. 399 (1956)].

Similar concern is manifest in the procedural protections that have been afforded. *Cooke v. United States*, 267 U.S. 517, 536 (1925) [hearing and counsel]; *Bloom v. Illinois*, 391 U.S. 194 (1968) [right to jury trial in serious contempt cases]; *Taylor v. Hayes*, 94 S. Ct. 2697, 2704 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955); *Cooke v. United States, supra*, 267 U.S. at 539 [right to an impartial judge].

the court,' " where " 'summary vindication of the court's dignity and authority' " is essential. And the Court's reliance on only *Ex Parte Terry*, 128 U.S. 289 (1888), and *Cooke v. United States*, 267 U.S. 517 (1925), cases involving violent conduct in the courtroom and insolent behavior toward the bench, gives meaning to "misbehavior" as a term of art in the context of contempt law.

"Misbehavior" is historically quite distinct from simple "disobedience" to a court order. From earliest times contempt with respect to the latter has been deemed "entirely different in its nature and origin" from contumacious acts which physically disturb the court. Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 164 (1908). Indeed, disobedience of a court order, previously the Writ of the King, is the original predecessor of civil, not criminal contempt.[9] Fox, THE HISTORY OF CONTEMPT OF COURT, 1 (1927).[10] The distinction is, of course, reflected in the

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[9]The Government's failure to recognize this fundamental distinction explains the error of its conclusion that historically, disobedience was subject to summary criminal punishment (Br. at 11-13). While disobedience may have been dealt with summarily, it was treated exclusively as civil and not criminal contempt. Beale, *Contempt of Court, Criminal and Civil, supra*, 21 Harv. L. Rev. at 164; Fox, THE HISTORY OF CONTEMPT, 1, 3 (1927).

[10]The distinction between "misbehavior" and "disobedience of a court order" prevailed in the colonial period and appears in the early precursors of present contempt laws. Without exception, these historic antecedents establish that each of the thirteen colonies enacted statutes which dealt separately with refusal of witnesses to testify. See Appendix to the Government's Brief in *Harris v. United States* (No. 6, October Term, 1965).

In each of eleven colonies which enacted separate statutes for misconduct in the presence of the court [excepting Georgia and

very statute under which this case arises. Compare 18 U.S.C. §401(1) with 18 U.S.C. §401(3). Thus it is not accidental that cases before this Court involving misbehavior involved instances of violence, disorder, physical disruption, and insolence. *Ex Parte Robinson*, 19 Wall. 505 (1783); *Ex Parte Terry, supra*, 128 U.S. 289; *In re Savin*, 131 U.S. 267 (1889); *Cooke v. United States, supra*, 267 U.S. 517; *Sacher v. United States*, 343 U.S. 1 (1952); *Offutt v. United States*, 348 U.S. 11 (1954).

When abusive language is uttered in open court, physical violence is threatened or actually occurs, or insolence is demonstrated, the dignity and civility of the court and its process are challenged. The urgency of the situation is self-evident, and summary action is required "to protect the judicial institution itself." *Harris v. United States, supra*, 382 U.S. at 167; *cf. Ex Parte Terry, supra*, 128 U.S. at 209; *Cooke v. United States, supra*, 267 U.S. at 536. Where, however, there is simple disobedience to a court order, the integrity and dignity of the court is not in issue,[11] and the situation

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North Carolina] it was clear that the acts envisioned were those of violence, disorder, disrespect, *i.e.*, swearing, tobacco chewing, leaving the courtroom before discharge, and noise. *Id.* at 10-12, 33, 60-61, 117, 172, 187, 212, 267, 297, 343.

[11]Indeed, refusal to comply with a court order to testify, absent special elements of contumacy, may well be viewed as resistance not to the court, but to parties to the litigation. *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 442 (1911). See also Appendix to the Brief of the United States in *Harris, supra*, which demonstrates that the majority of local colonial governing bodies provided that the refusal to testify would result in imprisonment (until compliance) or a compensatory fine.

is not the "exceptional" or "unusual circumstance" of which *Harris* speaks. See also *Bloom v. Illinois*, 391 U.S. 194, 208-09 (1968). Thus, *Harris* and history mandate that the applicability of Rule 42(a) turns not only on the place of the contempt, but on the nature and effect of the conduct in question.[12]

II

The Government also argues (Br. at 13) that when the facts surrounding the contempt are within the judge's personal knowledge there is no need for a hearing because the primary purpose of the Rule 42(b) proceeding is to resolve disputed issues of fact. While factual inquiry is, of course, one of the purposes of the hearing, it is not its only function.[13]

In both *Harris v. United States, supra*, 382 U.S. at 163, and *Cooke v. United States, supra*, 267 U.S. at 537, the procedural protections of Rule 42(b) were mandated despite the absence of a factual issue as to the contempt itself in order to ensure the opportunity to present legal defenses, propose alternative procedures, and present facts in mitigation.

In this case, had she been given the opportunity, there was much that counsel could have done pursuant

[12]Even the cases cited by the Government (Br. at 22) to establish the "general rule" that contempt committed in open court is summarily punishable are all cases of misbehavior.

[13]In fact, even if the contempt occurred in the presence of the court, jury trials are constitutionally mandated when the penalty imposed is more than six months. *Bloom v. Illinois*, 391 U.S. 194 (1968). See also *Taylor v. Hayes, supra*, 94 S. Ct. at 2702-04, where a hearing was mandated despite the judge's personal knowledge of all the facts.

to the plenary procedures of 42(b).[14] Since respondent had not been sentenced and could still move to withdraw his plea, counsel could have developed a defense based on the transactional immunity provisions of 18 U.S.C. §§2514, 2516.[15] *In re Veriker*, 446 F.2d 244 (2d Cir. 1971). Counsel could also have obviated the necessity of a contempt finding by proposing the very procedure described in the court of appeals decision—that the record of respondent's testimony be sealed and the matter referred to another judge for sentencing. (Pet. App. 21). Indeed, not only did the district court ignore this possibility, it fostered the belief, to respondent's detriment, that there was no manner in which he could be protected at sentence from prejudice caused by his testimony.

Finally, counsel could have developed all factors germane to sentencing as contemplated by *Harris* itself:

> . . . [A] hearing and only a hearing will elucidate all the facts and assure a fair administration of justice. Then courts will not act on surmise or

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[14]The Government's reliance on the fact that counsel presented no defense (Br. at 16) is disingenuous since the absence of a legal defense is necessarily the result engendered by refusal to provide notice and a hearing.

[15]Respondent was granted use immunity under 18 U.S.C. §§6002-6003. However, since he was indicted for bank robbery (18 U.S.C. §2113) and was being questioned about that very crime, it was indeed arguable that he was entitled to the broader immunity afforded by 18 U.S.C. §§2514 and 2516. Although repealed, these provisions do not become inoperative until December 15, 1974. See Pub.L. 91-452, Title II, §227(a), enacted October 15, 1970, but "effective four years following the sixteenth day after the date of enactment . . . ."

> suspicion but will come to the sentencing stage of the proceeding with insight and understanding.
>
> 382 U.S. at 167.

In this case respondent received the maximum penalty despite evidence which, even on this paltry record, suggested that his refusal to testify stemmed from emotional difficulties. In fact, it was the very absence of adequate psychiatric evaluation that precluded the district court from sentencing respondent immediately on the bank robbery charge despite the court's strong wish to avoid the contempt issue by doing so. Thus the court of appeals correctly observed that

> [w]ith additional time to prepare a defense, counsel for Wilson might have enlarged on the issue of [Wilson's] mental health, and perhaps shown a relationship between any psychological difficulties and the refusal to serve as a witness.
>
> (Pet. App. 24).

> Therefore, contrary to the Government's assertion (Br. at 18), this record is not silent with respect to mitigating circumstances. Moreover, as the Court itself, noted in *Harris v. United States, supra,* 382 U.S. at 166, a silent record is the beginning, not the end, of the inquiry.[16]

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[16]The Government is also wrong when it suggests Judge Lasker's willingness to entertain a later motion for reduction of sentence compensates for the deficiencies of the sentencing procedure under 42(a). Such procedure is improper under *United States v. Manuella*, 478 F.2d 440 (2d Cir. 1973), as was argued below. However, the court did not have to reach this issue.

III

The Government's final argument that summary imposition of the criminal sanction is justified because it is the only device that will produce desired testimony is also misconceived. It is civil, not criminal contempt, which is designed to secure compliance. As the Court wrote in *Shillitani v. United States*, 384 U.S. 364 (1966):

> "It is not the fact of punishment but rather its character that distinguish" civil from criminal contempt. *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 441 (1911). Despite the fact that [petitioners] were ordered imprisoned for a definite period their sentences were clearly intended to operate in a prospective manner—to coerce rather than punish. As such, they must relate to civil contempt. While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify.
>
> 384 U.S. at 369-70.

Nothing serves to demonstrate the foregoing more than the facts in this case. Judge Lasker did not impose this criminal sentence to coerce respondent's testimony. The record is clear that the sentence was imposed as punishment for refusal to testify: no expectation that the sentence would produce compliance was expressed, and there was no promise of sentence reduction should respondent change his mind. The sentence was made "provisional" strictly because the judge was without sufficient information to arrive at a proper sentence. Moreover, the possibility of even inadvertent coercion

was precluded when the sentence was stayed pending appeal. As Judge Lasker stated:

> I will stay the execution of the sentence until the appeal is determined and I will consider a reduction of the sentence should the appeal affirm my ruling *so that I don't think anybody needs to be worried about the situation at the moment.*
>
> (App. at 19-20. *Emphasis added*).

Assuming arguendo[17] that civil contempt will not effectuate compliance, the criminal sanction does not, *ipso facto*, become legitimate for that purpose. Criminal contempt which seeks to vindicate the court's authority is punitive in purpose. *Shillitani v. United States, supra*, 384 U.S. at 370; *Gompers v. Buck Stove & Range Co., supra*, 221 U.S. at 442-43. Its liability is greater than civil contempt for not only does it penalize, it stigmatizes a contemnor with a criminal conviction. *Bloom v. United States, supra*, 392 U.S. at 201; *Gompers v. United States*, 233 U.S. 604, 610 (1914).

That a criminal contempt sanction may have an incidental coercive effect does not eradicate the distinction between civil and criminal contempt.

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[17]The Government's assertion (Br. 16) that in the instance of short trials or where, as here, the witness is already incarcerated, criminal contempt must be used in place of the civil remedy to coerce testimony finds no support in fact or law. This theory indulges in pure speculation by concluding that even a short period of incarceration pursuant to a civil contempt order will not produce compliance. The sting of imprisonment, however brief, will have a strong impact on most men. In respondent's case, imposition of a criminal penalty merely because he was already incarcerated due to indigence itself raises constitutional questions of substance. *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970).

Shillitani v. United States, supra, 384 U.S. 364. Nor can the coercive effect be used in a bootstrap fashion to circumvent the procedural safeguards normally attendant on the criminal sanction. If the Anderson trial could not have continued without respondent's testimony, an hypothesis boldly contradicted by the record,[18] it was open to the judge to adjourn the proceedings for a short period of time to hold a Rule 42(b) hearing. This would have insured respondent's procedural rights without impairing the on-going trial. *Harris v. United States, supra*, 382 U.S. at 164.

It is also doubtful that immediate rather than subsequent imposition of a criminal sanction would be successful in procuring testimony. Disobedience is best overcome by the knowledge that a continuing failure to cooperate will result in severe punishment. See *Sacher v. United States, supra*, 343 U.S. at 37 (Mr. Justice Frankfurter, dissenting). In contrast, the finality of a criminal sentence, rather than encouraging compliance with an order to testify, may well, because the penalty has already been imposed, make the decision not to testify immutable. In short, as one might say, the significance of the Damocletian sword is not that it falls, but that it hangs.[19]

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[18]Judge Lasker was obviously correct when he found that the testimony was not essential, since Anderson was eventually convicted without it.

[19]Moreover, since the power to grant motions for a reduction of sentence pursuant to Rule 35 is purely discretionary [*Brown v. United States, supra*, 359 U.S. at 56 (dissenting opinion); *Flores v. United States*, 238 F.2d 758 (9th Cir. 1956)], the prospect of a possible reduction is far less certain or attractive than the guarantee of release from incarceration imposed pursuant to civil contempt or the likelihood that criminal sentence could be avoided by cooperation.

The procedure for dealing with recalcitrant witnesses, suggested by the Court and adopted by the court of appeals, provides that a judge intent upon obtaining testimony can immediately give the witness notice of a charge of criminal contempt and summarily incarcerate the witness for civil contempt pursuant to 28 U.S.C. §1826(a). If and when the civil remedy fails, the judge is then free to conduct a Rule 42(b) hearing to determine whether the witness should be convicted of criminal contempt and punished. *Yates v. United States*, 355 U.S. 66, 75 (1957); see also *Rex Trailer Co. v. United States*, 350 U.S. 148, 150 (1956); *United States v. United Mine Workers*, 330 U.S. 258, 299 (1947); *Gompers v. Buck Stove & Range Co., supra*, 221 U.S. at 452; *United States v. Marra*, 482 F.2d 1199, 1202 (2d Cir. 1973).

Initial resort to the civil sanction ensures that "the least possible power to the end proposed" will be used. *Shillitani v. United States, supra*, 384 U.S. at 371; *Anderson v. Dunn, supra*, 6 Wheat. at 231. Moreover, there is no diminution of the judge's power to incarcerate or to protect the process. As with summary criminal contempt, the recalcitrant witness is immediately imprisoned, but when punishment is called for it can be achieved without depriving him of the procedural protections which are designed to enhance the accuracy of the proceeding.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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